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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of the Interpretation	)	
of the "Reasonable Access" Requirement	)	
for Federal Candidates	)	

To: The Commission

PETITION FOR RULEMAKING

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE

By: Robert F. Bauer
Judith L. Corley
Brian G. Svoboda
Perkins Coie LLP
607 14th Street NW
Washington, DC 20005-2011
(202) 628-6600

Their Attorneys

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TABLE OF CONTENTS

SUMMARY

The Commission should initiate immediately a rulemaking proceeding to reexamine and reapply the "reasonable access" requirement which safeguards access to the public airwaves for candidates for federal elective office. The current regulations were written at a time when candidates' own broadcast advertisements dominated and shaped the discussion of campaign issues. Since then, however, the political landscape has changed dramatically. Increasingly, candidates and their public positions are being discussed *not* by candidate advertising, but rather by issue advertising and independent expenditures aired by outside groups.

The Commission should specifically develop new guidelines for what constitutes reasonable access, to allow candidates to be heard above the din of issue and independent spending. Changes might include considering the opportunities made available to outside special interest groups, in determining whether a station has met its reasonable access requirements in the sale of time to candidates. The Commission should also take steps to guard against rate incentives which may cause stations to favor outside group advertising over candidate advertising.

The collapse of the current regulated arrangement is evident in a number of ways. First, the growth of issue advertising and independent expenditures threatens to crowd out candidate advertising. Second, candidates find themselves needing to respond to outside group advertising under a regulatory scheme in which they are guaranteed no such opportunity. Finally, in the days immediately preceding an election, there exists a powerful economic incentive for licensees to maximize the time sold at normal unit costs for issue advertising and independent expenditures, while minimizing the time sold to candidates at the lowest unit cost. Timely Commission action would surmount these obstacles and restore the framework intended by Congress for the 1998 election and beyond.

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The Democratic Senatorial Campaign Committee ("DSCC") and the Democratic Congressional Campaign Committees ("DCCC")[1] petition the Federal Communications Commission ("FCC" or "Commission") to adopt rules promptly which would reformulate in radically changed circumstances the definition of "reasonable access" to the public airwaves for candidates for Federal elective office, and preserve Congress's plan to ensure candidate access to the public airwaves under the Communications Act of 1934, as amended ("Communications Act").

As the Commission has frequently noted, political broadcasting "is one of the major elements of a station's service because of the contribution broadcasting can make to an

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[1] The DSCC and DCCC are political committees established and maintained by a national political party, as defined in the Federal Election Campaign Act of 1971. They are respectively composed of the Democratic members of the United States Senate and the United States House of Representatives, many of whom seek re-election in 1998. Their purpose is, among other things, to aid and encourage the reelection of their members, and the election of other Democratic candidates. They accomplish this purpose by, among other things, advising Democratic candidates and advocating their interests.

Both as buyers of broadcast time, and as organizations whose members buy broadcast time through their campaigns, the DSCC and DCCC have a direct interest in Commission action sufficient to confer standing in a judicial forum. See FEC v. Akins, 118 S. Ct. 1777 (1998). See also Suncom Mobile and Data, Inc., v. FCC, 87 F.3d 1386 (1996).

informed electorate -- in turn so vital to the proper functioning of our Republic." FCC, The Law of Political Broadcasting and Cablecasting: A Political Primer 56 (1984) (internal citations omitted). The proper functioning of our democracy depends on candidates' ability to communicate their positions to the electorate.

The rise of outside group "issue" and "independent expenditure" advertising[2] threatens to mute the voice of Federal candidates, in clear contravention of Congressional intent. The Commission should act promptly to conform its regulations with the new and inalterable realities of independent and issue-related communications.

I. BACKGROUND

To ensure a healthy democracy, Congress in 1972 enacted section 312(a)(7) of the Communications Act, which permits the Commission to revoke a station license for "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for use of the broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (1998). It was Congress's clear intent that Federal candidates be heard, and that voters be able to choose intelligently from among different points of view presented by candidates.

The "reasonable access" requirement was augmented and strengthened by two other key provisions of the Communications Act that were designed to ensure full exposure to diverse views. One is section 315(a), which requires licensees to afford all legally qualified candidates for public office equal opportunities for the use of a broadcasting station. 47 U.S.C. § 315(a). The other is section 315(b), which requires licensees to sell broadcast time

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[2] "Issue advertising" refers to those ads by outside special interest groups which discuss the public positions of a candidate or officeholder, and yet which do not expressly advocate the election or defeat of a candidate, and thus are not regulated by the Federal Election Campaign Act of 1971. "Independent expenditures" include those ads which expressly advocate a candidate's election or defeat, and which are not made in concert with, or at the request or suggestion of, a candidate. See 2 U.S.C. § 431(17).

to candidates at the lowest unit charge for the same class and amount of time for the same period during the 45 days preceding a primary or runoff election, and the 60 days preceding a general or special election. 47 U.S.C. § 315(b). Through the reasonable access, equal opportunities and lowest unit charge provisions, Congress created a broad framework to ensure that federal candidates would be heard in a balanced manner to the benefit of a voting public called upon to choose among them.

Facing a world in which candidate advertising was the dominant means of political and issue-related communication, the Commission in the past has interpreted these statutes narrowly. It has been reluctant to set strict standards for what constitutes "reasonable access," preferring instead to rely on the good faith judgment of licensees. In 1991, the Commission wrote:

> On further reflection, the Commission continues to believe that formal rules would not be practical, and that we should continue to rely upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates. Reasonable access does not lend itself to a specific number of hours based on complex formulas. Rather, what constitutes "reasonable access" depends on the circumstances surrounding a particular candidate's request for time and the station's response to that request.

Codification of the Commission's Political Programming Policies, 7 F.C.C.R. 678, 681 (1991).

In its regulations, the Commission also narrowed the "equal opportunities" requirement. Confronting in its infancy the phenomenon of outside group advertising, the Commission held that the equal opportunities guarantee applied only to candidate appearances that are controlled, approved or sponsored by the candidate. Id. at 685. In so doing, the Commission relied heavily on the fact that "[i]ndependent entities that oppose or support candidates do not have any access rights; only federal candidates are accorded access rights. Thus, licensees are not required to accept any political material that is not authorized by candidates." Id. The Commission noted that it "retains the discretion to revisit these rules if abuses become apparent . . . If . . . the accomplishment of Congress' objectives under the

political broadcasting provisions is not enhanced under this approach, we will respond accordingly." Id.

However, the Commission did not account for a political environment in which outside groups would dominate the debate with "issue" and independent advertising. The rise of issue advertising and independent expenditures has been recent, rapid and striking. A study prepared by the Annenberg Public Policy Center of the University of Pennsylvania found that during 1995 and 1996, more than two dozen organizations spent as much as $150 million on national issue advertisements. Issue Advocacy Advertising During the 1996 Campaign, Annenberg Public Policy Center (University of Pennsylvania) (1997). The level and content of such advertising during the 1996 election cycle represented a dramatic departure from previous election cycles.

Moreover, since the 1996 election, the dominance of outside group advertising has reached new heights, even before the 1998 general election campaign has fully begun. News accounts indicate that in the days preceding the March 10, 1998 special election for the U.S. House of Representatives in California's 22nd Congressional District, outside groups spent at least $750,000 on issue advertising and independent expenditures.[3] Eliza Newlin Carney, Staking the Wrong Reform, Nat'l J., Apr., 11, 1998, at 822.

As a result, the political community is now bracing for an unprecedented onslaught in outside group advertising. In the words of one commentator: "The boom in interest-group spending, in fact, is radically transforming American politics. Some experts predict that advertising by this powerful bloc will be the defining trend of 1998." Id. The New York Times reported recently that "several organizations are poised to spend, collectively, millions of dollars this year to press their issues in local and state races to elect their favored

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[3] The true amount cannot be known, because under the Commission's current regulations, the "political file" maintained by broadcast stations need only include requests for broadcast time "made by or on behalf of candidates." See 47 C.F.R. § 73.1940(d) (emphasis added). See also 47 C.F.R. § 76.205(d) (political file requirement for cablecasters).

candidates." Richard L. Berke, Outside "Help" on Issues Raises G.O.P. Fears of Voter Backlash, N.Y. Times, Mar. 25, 1998, at A19. The Washington Post has reported on the view of campaign consultants and observers like Ralph Reed, the former executive director of the Christian Coalition, who said, "I don't think American politics will ever be the same. You can expect to see sizable advertising and direct-mail campaigns by outside interest groups as far as the eye can see." Ruth Marcus, When the Opposition Isn't on the Ballot; Candidates Expect Another Fall of 'Issue Advocacy' Spots; Outside Groups Anxious Too, Wash. Post, June 30, 1998, at A4.

II. DISCUSSION

A. THE COMMISSION SHOULD PRESERVE CONGRESS' INTENT BY CLARIFYING THE 'REASONABLE ACCESS' REQUIREMENT.

The Commission should act now to revise current rules to clarify and reinforce the reasonable access requirement in these new circumstances, providing Federal candidates with a minimal degree of recourse as they confront the advertising of outside groups. The Commission can preserve Congressional intent and serve the public interest with a rulemaking proceeding which includes:

- New guidelines for evaluating whether a licensee's judgment in affording access is reasonable. Specifically, the Commission could state that in determining whether a station's grant of access to candidates is "reasonable," it will consider the opportunities made available by the station to outside groups for a discussion of a Federal candidate's public record or positions, or those of the candidate's opponents. It is manifestly illogical to judge the reasonableness of the "access" afforded a candidate, without regard to the total amount of airtime sold for all advertisements concerning that candidate.

- Measures to assure that in selling broadcast time, stations are not influenced by rates in favoring issue advertising and independent expenditure advertising which refers to clearly identified Federal candidates over less profitable advertising that is run directly by candidates and their authorized committees. Licensees have often bridled under the lowest

unit charge requirement in the past. See, e.g., Notice of Apparent Liability, 12 F.C.C.R. 5989 (1997) (Bay Comm. Inc.); Notice of Apparent Liability, 11 F.C.C.R. 5785 (1996) (Duchossois Comm. Co. of Maryland, Inc.); Notice of Apparent Liability, 9 F.C.C.R. 2283 (1994) (Jack M. Mortensen); Political Programming Audit, 68 Rad. Reg. 2d (P & F) 113 (1990). Commission action is essential if such conduct is not to recur, in a manner which prevents candidates from being heard to any meaningful extent.

B. THE COMMISSION'S CURRENT REGULATIONS ARE INADEQUATE TO ENSURE THAT FEDERAL CANDIDATES ARE HEARD, IN CONTRAVENTION OF CONGRESS' MANDATE.

If the Commission takes no action, the anticipated surge in outside group advertising will create a climate in which candidates are increasingly unable to be heard, and in which the Congressional intent of an informed electorate is ill served. In the coming weeks, issue advertisements and independent expenditures will raise three dilemmas for Federal candidate access to the pubic airwaves, in frustration of congressional intent, and for which Commission regulations now offer no recourse.

First, a flood of outside group advertising threatens to crowd out the ads which candidates themselves would run. The Commission presently relies on the good faith judgments of licensees to provide reasonable access to Federal candidates, and has said that licensees cannot flatly ban Federal candidates from certain classes of time. 7 F.C.C.R. at 681. Yet it has also told licensees that "in providing reasonable access, stations may take into consideration their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by political advertising, and the amount of time already sold to a candidate in a particular race." Id. at 681-82 (citing Report and Order, 68 F.C.C. 2d 1079, 1090 (1978)). Concerned with program diversity, licensees very easily could use their reasonable, good faith judgment to view the sale of candidate and outside group advertising as a "zero-sum game," and accordingly reduce the opportunities available to Federal candidates while granting more opportunities to outside

groups. The DSCC and DCCC are convinced that a close examination of station policies would reveal that stations are engaging in precisely this sort of calculation, as the committees' members and candidates are finding it considerably more difficult to secure the broadcast time they require.

Ironically, the curtailing of Federal candidate advertising would occur as Federal candidates face a second dilemma: how to respond to the outside groups' ads. While candidates have faced this problem in the past, the new proliferation of outside group advertising increases the candidate's burden dramatically. For a candidate to respond over the airwaves to last-minute outside group advertising could well be essential to the success of that candidate's efforts to communicate with the public; and yet the candidate is guaranteed no opportunity to respond under current Commission rules. The Commission has specifically stated in the past that "equal opportunities" arise only from those uses "that are controlled, approved or sponsored by the candidate (or the candidate's authorized campaign)." 7 F.C.C.R. at 685.

Finally, in the days immediately preceding an election, the opportunity to air outside group advertising creates a powerful economic incentive for licensees to maximize the time sold at normal unit costs for these types of advertising, while minimizing the time sold to candidates at the lowest unit cost. The Commission in 1991 downplayed the threat of outside group advertising to the existing regulatory framework, noting that "[i]ndependent entities that oppose or support candidates do not have any access rights" and that "we have never held that independent entities were entitled to the lowest unit charge." Id. at 685. But what the Commission then viewed as a shield for candidates has now become a sword. In the final days of a campaign, given a choice between airing issue advertising at normal unit costs, and candidate advertising at the lowest unit charge, broadcasters simply have every incentive to give preference to issue advertising and independent expenditures.

As Congress knew, and as the Commission has stated, the ability for candidates to be heard directly is vital to the electoral process. The flood of outside group advertising, when combined with the Commission's current regulations, creates an environment in which some candidates will not be heard above the clamor of outside group issue and independent advertising.

III. CONCLUSION

For the above stated reasons, the Commission should commence a rulemaking to develop new guidelines for what constitutes reasonable access. The Commission has acted in the past to protect the public interest, and to preserve the integrity of the political broadcast requirements. By taking further action promptly, the Commission can preserve the regulatory scheme in the 1998 elections, and in elections to come.

Respectfully submitted,

DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE

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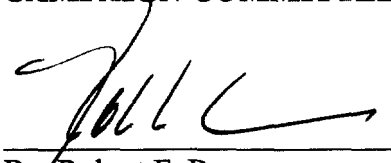

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